(9)

No. 94-1471

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

VARITY CORPORATION,
Petitioner,
v.
CHARLES HOWE, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICI CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS IN SUPPORT OF RESPONDENTS

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS HEALTH AND
WELFARE AND PENSION FUNDS
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(708) 518-9800
Attorneys for Amici Curiae
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1471

VARITY CORPORATION,
Petitioner,
v.

CHARLES HOWE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF AMICI CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Central States Pension Fund

Central States, Southeast and Southwest Areas Pension Fund is a multiemployer defined benefit pension trust fund established in 1955 by affiliates of the International Brotherhood of Teamsters and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act (LMRA). The Pension Fund is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). The trustees are plan fiduciaries within the meaning of Section 3(21)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.

§ 1002(21)(A). The Pension Fund is administered for the exclusive benefit of the participants to whom the trustees owe an undivided duty of loyalty. The purpose of the Pension Fund is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the Central States pension plan. Central States Pension Fund is the largest multiemployer pension plan in the country. Its current assets exceed $12.3 billion and the present value of its liabilities for vested benefits is approximately $14.5 billion. Participating employers contribute to the Pension Fund pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. The Pension Fund covers 170,000 retirees presently drawing benefits and 220,000 active participants of approximately 5,000 contributing employers.

Central States Health and Welfare Fund

Central States, Southeast and Southwest Areas Health and Welfare Fund was established in 1950. It provides health and welfare benefits to eligible employees of contributing employers that are signatory to collective bargaining agreements with local unions affiliated with the International Brotherhood of Teamsters. Like the Pension Fund, the Health and Welfare Fund is governed by a Board of Trustees consisting of four management and four union-appointed trustees, who are plan fiduciaries within the meaning of ERISA.[1] The Health and Welfare Fund has net assets of more than $130 million and provides benefits to more than 125,000 active participants, as well as over 20,000 retirees and their families.

---

[1] The two funds are jointly administered under the direction of the same eight-member Board of Trustees. The Funds will hereafter be referred to collectively as Central States or individually as the Pension Fund and the Health and Welfare Fund.

Interests of Central States

The Central States plans are multiemployer plans and thus are fundamentally different from the single-employer plan administered by Petitioner Varity Corporation ("Varity") which is the subject of this case. Multiemployer plans are funded by more than one employer (in the case of Central States, thousands of employers) and are administered by an independent board of trustees who are the plan fiduciaries. Varity's plan by contrast is funded by Varity which also administers the plan and is the plan fiduciary. Despite these differences in these types of plans, ERISA applies a single set of rules to both. Central States is concerned that the ruling in this single-employer plan case should also take into account its impact on multiemployer plans.

The court below ruled that individual plan participants may maintain an action for equitable relief against a plan fiduciary pursuant to Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). As relief for the fiduciary breaches by Varity, the court ordered that certain retirees be restored to their original health and welfare plan. The court further ordered "restitution" be made by Varity to these retirees for their lost benefits. This latter form of relief is of concern to Central States (and to multiemployer plans generally). Ordinarily benefits are paid by plans, not fiduciaries. In ordering restitution from Varity, the court below did not specify whether Varity would pay these benefits from its plan or directly. Because Varity was the sole source of plan funding, it would pay in either case. If, however, this restitution remedy were applied under similar circumstances to the trustees of a multiemployer plan, the same would not be true. If payment of the benefits is deemed a personal liability of the trustees rather than the plan, the plan (and indirectly its contributing employers) is relieved of an obligation that was otherwise its to pay. And if decisions by trustees regarding the payment of benefits can be construed as

fiduciary breaches that subject the individual trustees to personal liability for the benefits, then there will be no trustees for none will serve.

SUMMARY OF ARGUMENT

The court below ruled that a cause of action may be maintained under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), by individual plan participants for their own benefit against a plan fiduciary to enjoin a breach of fiduciary duty. Specifically the court affirmed a district court ruling that Varity had breached its fiduciary duties to certain retiree participants in its health and welfare plan by transferring them to a new plan that subsequently folded. The court ruled that Varity must restore the participants to their original plan. The court, then, ruled that "restitution" to these participants be made by Varity as a further form of equitable relief.

Assuming that the court below was correct in its first ruling—that a cause of action against a fiduciary may be brought under § 502(a)(3) and that an injunction against Varity to restore the retirees to their original plan is appropriate equitable relief—was the court also correct in ordering restitution from Varity? If the answer is yes, this court should clarify the rationale for that relief. In Varity's case an order to pay the retirees' lost benefits does not need further refinement because Varity is the source of plan assets to pay the benefits in any event. Multiemployer plans to which this kind of ruling might be applied are different in that the fiduciaries (the plan's trustees) are not the source of plan assets. An order of restitution directed against the trustees personally would not be appropriate equitable relief because the trustees did not gain from the participant's loss. Such liability for trustees would dangerously destabilize multiemployer plans for who would accept such a job at such risk.

Section 409(a) of ERISA, 29 U.S.C. § 1109(a), limits the pensonal liability of fiduciaries for their fiduciary

breaches to that amount necessary to make the plan whole. An action against a fiduciary under § 502(a)(3) for a fiduciary breach may result in other equitable relief, but should not extend the scope of personal liability. To the extent "restitution" is an available remedy under § 502 (a)(3), it should restore the parties to their prior positions. Only if the loss to the participants inures to the benefit of the fiduciary, should direct restitution be available. If the fiduciary does not benefit, as is generally the case with multiemployer plan trustees, personal liability for lost benefits is not appropriate relief. This does not mean that no relief is available. If a court may restore the participants to the plan under § 502(a)(3), as the court did here, then it has restored the plan's obligation to pay the participants' benefits. Thus the remedy should be payment by the plan (which loses nothing it should not have paid in the first place), not by the trustees personally. The appropriate "restitution" remedy under § 502(a)(3) would be an injunction that the fiduciary cause the plan to pay the benefit. Alternatively, the participant would have a cause of action against the plan under § 502(a)(1) for the benefits that were otherwise lost.

ARGUMENT

I. RESTITUTION ORDERS AGAINST TRUSTEES WOULD BE UNTENABLE FOR MULTIEMPLOYER PLANS.

In the single-employer plan at issue here the fiduciary (Varity) is also the source of funding for the plan. By ordering Varity, the fiduciary, to make restitution the court, in effect, also orders Varity, the sole source of funding for the plan, to pay benefits to these participants. This is the same as ordering the plan itself to make the payments. Both parties below are, therefore, largely indifferent to how the monetary relief is characterized because however so, its source is the same. This reflects in the decision below, which does not draw such distinctions. These distinctions are, however, very important for

other plans and especially for multiemployer plans where the source of funding and the fiduciaries are different. In the case of a multiemployer plan, to order that a fiduciary make restitution for payments otherwise due under the plan is to introduce a different source of funding for these benefits; and the plan (and those who fund it) are relieved of the obligation that would otherwise be theirs to pay the benefits.

If the decision below is affirmed without clarification, then courts may begin to allow fiduciary claims resulting in restitution orders against trustees of multiemployer plans in cases like this that involve only the payment of benefits to individual participants. We can be sure of two effects. First, it is unlikely that trustees generally will be able to pay these benefits. Trustees, generally, will not have the resources to satisfy the order. Nor is a fiduciary breach the kind of event that may readily be insured. As a consequence trustee personal liability is probably not an adequate remedy for a participant's lost benefits. Second, who would serve as a trustee if personal liability under the circumstances of this case is the cost. Trustees are volunteers who generally serve without pay. They do not expect or accept the risk of having to pay benefits of participants in lieu of the plan. It is unlikely that any qualified person would take such a risk, nor would it be reasonable to expect anyone to assume it.

In sum the availability of a broad restitution remedy to apply to multiemployer plan trustees for the benefit of individual participants would not provide an adequate remedy to participants and would harm plans by driving away trustees.

Central States does not, however, contend that the court below was wrong in ordering restitution from Varity. The problem, in Central States view, is that if the court below is simply affirmed, it may be construed that ERISA fiduciaries generally are personally liable to make restitution for their fiduciary breaches resulting from

their decisions regarding participation and the payment of benefits. Central States believes that such a broad interpretation should be rejected and that this Court should clarify that restitution from fiduciaries to individual participants is available only where the fiduciary was enriched at the individual's expense. This is clearly the case with Varity, but would generally not be the case with trustees of multiemployer plans.

II. RESTITUTION SHOULD COME FROM THE PLAN.

Having held that § 502(c)(3) permits an individual action against a fiduciary for a breach of fiduciary duty, the courts below sought relief within the scope of that provision. Section 502(a)(3) allows injunctions against violations of ERISA and "other appropriate equitable relief." Accordingly the court of appeals affirmed an injunction to restore the retirees to their original plan. The court also affirmed so much of the district court's ruling that ordered restitution of lost benefits to the retirees by Varity. The court of appeals did not specify its rationale for why Varity should make restitution rather than the plan to which the individuals were restored.

Under Section 409(a) of ERISA, 29 U.S.C. § 1109(a), however, a plan fiduciary is "personally" liable only to make good to such plan any losses to the plan resulting from such breach. Section 409(a) is enforced through § 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2). Relief to individuals is not available under these provisions. *Massachusetts Mutual Life Ins. Co. v. Rusell*, 473 U.S. 134 (1985). Individual relief may be found in § 502(a)(1) (to recover benefits) and in § 502(a)(3) (to enjoin violations of the statute and for other appropriate equitable relief). The court below ruled that a fiduciary breach that damages an individual may be redressed through § 502(a)(3), and restoration

of the retirees here to their original plan would appear to be appropriate equitable relief.

In light of the limits provided by § 409(a), however, is it appropriate equitable relief to expand the personal liability of fiduciaries under § 502(a)(3)? Central States agrees for purposes of this brief that an order of restitution against Varity was appropriate. But the order against Varity can be viewed in two ways (with the same effect) that are consistent with the statute. First, Varity profited at the expense of the retirees—a classic circumstance justifying restitution. *See Tull v. U.S.*, 481 U.S. 412, 424 (1987) citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946); *see also Health Cost Controls v. Skinner*, 44 F.3d 535, 538 (7th Cir. 1995). But also the order could be construed as directing Varity, who controlled and funded the plan, to make restitution from the assets of the plan for the lost benefits. It would be unnecessary for the court below to put such a fine point on its order, however, because Varity will pay in any event and the status quo will be restored.

In order to restore the status quo where a multiemployer plan is involved, the restitution order must be more precise. The trustees of the plan do not profit from this kind of fiduciary breach, so there is no ill-gotten gain to be restored to the participant by the fiduciary personally. On the other hand the plan has been enriched to the extent it did not pay benefits it otherwise would have. And the contributors to the plan benefit indirectly through lower plan payments. So the multiemployer plan, not the trustee, should make restitution to an individual deprived of a benefit through a fiduciary breach.

There are two routes to this more appropriate remedy. One would be an action against the plan under § 502(a)(1) for payment of the benefit. But a plaintiff who lacks the foresight to make the plan a defendant is not without remedy. It is within the power of the court to

enjoin the fiduciaries not only to restore the individual's status as a participant, but to restore the benefits as well. An order directing the trustees of a multiemployer plan to cause the plan to pay the lost benefits restores each party and the plan to their rightful positions as if the breach had not occurred. The plan and its contributing employers are no worse off since the benefits should have been paid in the first place; the participant receives the benefits that were due; and the trustees perform their duty as they should have in the first place.

In sum, if this court affirms the court below it should clarify that the restitution remedy under § 502(a)(3) is directed to the fiduciary's obligations to pay benefits under the plan and not to the personal liability of the fiduciary.

CONCLUSION

The court below reached the correct result and should be affirmed, but the rationale of that result should be clarified to limit the restitution remedy to the plan, not the fiduciary.

Respectfully submitted,

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(708) 518-9800
Attorneys for Amici Curiae
* Counsel of Record